ONTARIO HUMAN RIGHTS COMMISSION

IN THE MATTER OF the Ontario Human Rights Code, R.S.O. 1981, ch. 53, as amended;

IN THE MATTER OF the complaint made by Ms. Judy Salamon, dated March 12, 1986, alleging discrimination in employment on the basis of sex, marital status, sexual solicitation, and reprisal by Searchers Paralegal Services and Mr. Datinder Sodhi, Vice-President, of Toronto, Ontario.

BEFORE: Professor F. H. Zemans - Chairman

Counsel for The Ontario Human Rights Commission	Ms. Leith Hunter and Ms. A. Lyon
For Datinder Sodhi and Searchers Paralegal Services	Mr. Datinder Sodhi

INTERIM DECISION

On January 27, 1987 I was appointed by the Minister of Labour to serve as a Board of Inquiry pursuant to the Ontario Human Rights Code, 1981, (the "Code") to hear the complaint of Ms. Judy Salamon, (the "Complainant") against Searchers Paralegal Services and Mr. Datinder Sodhi, Vice-President, of Toronto, Ontario (the "Respondents"). The Complainant alleges discrimination in employment on the basis of sex, martial status, sexual solicitation, and reprisal by the Respondents contrary to sections 4(1), 6(3),(a),(b), 8, and 22(2) of the Code.

On February 23rd, 1987 this matter came for a preliminary hearing. On that occasion, it was agreed that the inquiry was to be adjourned for hearing of the evidence to Monday June 8, 1987. Mr. Sodhi requested a copy of the Analysis of Investigation prepared by Ontario Human Rights Commission (the "Commission"). Counsel for the Commission indicated that her client was prepared to provide the Respondents with particulars of the Complaint but not with details of the testimony of witnesses or their names. The Respondent Sodhi stated that he would not be satisfied with anything less than a copy of the complete Analysis of Investigation Findings, of which he had received only the conclusion. I ordered that the Commission, through its counsel, deliver by Friday March 6th, 1987 further particulars with respect to the amended Complaint, dated 12th of March 1986. The Respondents were given until Friday, March 13th, 1987 to decide

whether they would be requesting further particulars. A further preliminary hearing was tentatively set for Wednesday March 18th, 1987, if further particulars were requested.

On March 5th, 1987 counsel for the Commission forwarded to the Respondents a three page letter which set out in considerable detail particulars of the facts that will be relied upon at the hearing with respect to the amended complaint dated the 12th of March 1987. As well, Commission counsel's letter stated that the Commission plans to call similar fact evidence, and gave separate outlines of the evidence of two potential witnesses the Commission intends to call to provide this evidence. Commission counsel indicated in her letter that she has definite plans to call the first of these two people to be a witness at the hearing. She also indicated that she was still attempting to contact the second potential witness for an interview, and therefore was unable to set out the expected testimony of that person with certainty. Counsel therefore undertook to provide further or corrected information with respect to this second potential witness, as required, to the Respondents.

On March 7th, 1987 the Respondents wrote to counsel for the Commission complaining that they had not received a photocopy of pages 1 to 6 of the Analysis of Investigation Findings and stated that they had been denied full and fair disclosure as required under the Statutory Powers Procedure Act, R.S.O. 1980, ch. 484 (the "SPPA") and the Canadian Charter of Rights and Freedoms.

On March 9th, I received a written request from the Respondents to issue a "Summons to a Witness" to one Judy Fiddes, a Human Rights officer employed by the Commission whom the Respondents allege prepared the Analysis of Investigation Findings. The Summons, if issued as requested, would have required Ms. Fiddes to appear at the hearing on March 18th, 1987, and to produce the original intake questionnaire completed by the Complainant, the Analysis of Investigation Findings, including pages 1,2,3,4,5, and 6 and all other documents prepared by Ms. Fiddes that were considered by the Commission with the Complaint herein.

I informed the Respondents that I would consider the question of issuance of a Summons to a Witness as well as the request for the future particulars at the March 18th hearing.

On March 18th, 1987, a preliminary hearing was held at which the Respondents brought two applications for interim relief. The first sought an order requiring the Commission to provide further particulars including the names of witnesses to be called at the Inquiry, the name of a company (referred to in the letter of particulars) Mr. Sodhi was allegedly representing at an interview conducted in May of 1985, and a copy of the documents referred to as "pages 1 to 5 of the Analysis of Investigation Findings" and "intake questionnaire". The second application was to request that I issue a summons to compel Ms. Fiddes to attend before me and to produce certain documents previously referred

to. Hence, the two applications are closely related and are both dealt with in this decision.

SUMMONS OF JUDY FIDDES

I find that the Respondents are not entitled to compel Judy Fiddes to attend at a preliminary hearing in this matter. The statutory authority for compelling witnesses to attend at this inquiry is section 12(1)(a) & (b) of the SPPA, which empowers a tribunal to

> require any person, including a party, by summons,
> (a) to give evidence on oath or affirmation at a hearing; and
> (b) to produce in evidence at a hearing documents and things specified by the tribunal.

As stated above, the Respondents have indicated that they sought to summon Judy Fiddes to gain access to (a) the "intake questionnaire" of the Complainant, (b) what is referred to as the complete "Analysis of Investigation Findings", and (c) any other documents prepared by her and considered by the Commission.

Section 12 of the SPPA empowers this Board to require witnesses to produce documents as well as to give oral testimony. However, in the circumstances of this case, it is not appropriate in my opinion to compel Ms. Fiddes to attend at a preliminary hearing for these purposes. Section 12(1)(a) clearly states that the party summoned is to give evidence at a hearing and further that any documents produced under this section are to be produced "in evidence at a hearing". Hence, any documents that are produced are to go into evidence. The provision does not

contemplate, and therefore cannot be used for, pre-hearing discovery. Whether the documents requested would be admitted as exhibits will have to be decided at the hearing itself, and not at this preliminary stage. In Benet v. Merer et al, an unreported decision of P.A. Cumming dated May 2, 1981, the Board of Inquiry stated at page 5:

> . . . under s. 12(1)(b) of the Statutory Powers Procedures Act, production of a document is to be for the purpose in producing it in evidence at the hearing and not simply for the purpose of obtaining discovery.

In Guru v. McMaster University (1980), 2 C.H.R.R. D/253, the Board of Inquiry indicates at page D/254 that the power to issue a summons pursuant to section 12 of the SPPA is not to be used as a means of discovery. Instead,

> As in the case of other tribunals, which do not possess the power to compel production of documents for inspection and examination, it may be necessary to grant an adjournment at the hearing pursuant to section 21 of the Act, in order to do substantial justice to the parties, where they are genuinely surprised by the presentation of evidence which they could not have reasonably been aware of.

Hence, an adjournment is the appropriate protection for the Respondents in the event that they are surprised by the content of a document entered into evidence. Similarly, in Marinelli v. City of Windsor, an unreported decision of R. Kerr dated May 10, 1982, the Board of Inquiry suggests at page 13 that a summons can only be used as an aid to the production of evidence, but not as a means to discovery. I agree with the reasoning in these decisions, and find that they settle this issue.

It is worth noting, however, that much or all of the information gained by Commission officers at the inquiry and conciliation stages of human rights proceedings is privileged. In Benet v. Merer et al, supra, the Board of Inquiry states at page 9 that

> the testimony of the [Commission] officers as to the inquiry and conciliation stage, are privileged on one or more grounds.

And at page 10:

> ... [T]he objective of conciliation of the Code would be compromised, if discussions and knowledge gained in that process could be forced through a subpoena to be divulged at a subsequent hearing.

Although it is not certain that questions the Respondents would ask of Ms. Fiddes would relate to privileged matters, the point here is that the problem of privilege would likely arise and consideration of this issue is better left to the hearing itself. The Respondents are free to summon Ms. Fiddes in the normal course to testify at the inquiry. It is clear that the summons is not appropriate at this preliminary stage.

There was considerable discussion during the March 18th, 1987 hearing about the issue of using this summons for the purpose of a "fishing expedition". Commission counsel brought considerable case law before me to suggest that a summons for the purpose of "fishing for evidence" is improper. However, while I agree that use of a summons to "fish for evidence" is indeed improper, it does not appear in the circumstances at hand that the Respondents are attempting to use the summons for this purpose. The summons was quite clearly intended to be used for

sole purpose of gaining production of certain documents, and for seeking an explanation as to why the documents have not been produced. Both of these matters have been dealt with above. There is no issue of "fishing for evidence" in respect of the summons in question.

Even if this was at issue, it would not affect my decision with respect to the summons. It would simply be one more reason for refusing it. Commission counsel alleged at the March 18th, 1987 hearing that Mr. Sodhi had embarked on a fishing expedition

> not to find out the facts on which the commission is about to base its case, but to find facts of which hopefully he wishes to challenge the commission in another forum (sic). [Transcript, p. 25].

It is clear that a summons issued pursuant to section 12 of the SPPA cannot be used for this purpose. It can only be used for the purpose contemplated by the section, namely, to bring forward evidence that may be relevant to the hearing in question. In Guru v. McMaster University, supra, the Board of Inquiry states at page D/253:

> A subpoena duces tecum [i.e. a summons with a requirement for production of documents] or an application in the nature of such a subpoena . . . may be set aside or refused where it appears that the request is irrelevant, fishing, speculative, or oppressive.

The same passage is quoted with approval in both Olarte et al v. Commodore Business Machines et al (1983), 4 C.H.R.R. D/1399 & D/1705, and in Benet v. Merer et al, supra, at page 6. I therefore decline to issue the summons of Ms. Fiddes as requested by the Respondents.

PARTICULARS

Counsel for the Commission argued that the Respondents are not entitled to any further documents or particulars of the complaint other than those already provided.

Any authority that a Board of Inquiry has to order particulars is derived from section 8 of the SPPA, which provides as follows:

> Where the good character, propriety of conduct or competence of a party is an issue in any proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

It is clear that the Complaint herein is within this provision. Therefore, the question before me is whether the Commission has provided the Respondents with reasonable information about these allegations. The Respondent is seeking two kinds of information: (a) the production of certain documents (listed above) and (b) names of certain witnesses the Commission intends to call. I will deal with each of these issues.

Documents

I find that the Respondents are not entitled to production of the additional documents that they have requested, for the following reasons. Firstly, section 8 of the SPPA is not broad enough to encompass pre-hearing discovery. It requires only disclosure of "reasonable information". There is no legislative provision for pre-hearing discovery of documents. In the case of

Nembhard & Manridge v. Cansurop Mfg. Ltd., unreported, dated March 11, 1976, Chairman S. N. Lederman said at page 22:

> Prior to the hearing, a respondent therefore is entitled to receive sufficient information about the allegations to enable him to prepare his answer to them. This section [s. 8 SPPA] does not, however, refer to advance notice of documentary evidence but merely to reasonable particularity of allegations. ... Accordingly, there does not appear to be any present power in the Board to order production or inspection of documents prior to the hearing.

I find myself in full agreement with this argument, and find that it alone is sufficient to deny the Respondents production of the documents they seek.

It is worth noting that these documents could well be inadmissible on other, independent grounds. Although I am not making any specific findings as to privilege at present, it is quite possible the documents the Respondents are seeking would be privileged and therefore not producible. In Benet v. Merer et al, supra, the Board of Inquiry addressed the issue of privilege and the production of Commission documents at page 9:

> First, the materials requested...have been prepared in consequence of the Complaint filed. The Commission's file was prepared with a view to conciliation following investigation and in contemplation of a Board of Inquiry if conciliation was not successful.

And further,

> Documents are privileged when they are prepared in contemplation of litigation. Such materials are privileged in law because a party to litigation should be able to assess, and determine his position without fear of disclosure, and material prepared in this regard is not really relevant to the factual evidence culminating in the event which has given rise to litigation.

This leads to a third possible, independent reason for denying production of the requested documents, namely that the documents may not be relevant to issues before this Inquiry. I accept the argument of Commission counsel that these documents may well go to the question of why the Commission determined that a Board of Inquiry should be appointed. The information on which the Commission has based its decision to ask the Minister to appoint an inquiry is not relevant or appropriate before me, and may potentially influence how I decide this matter. I must decide this inquiry on the basis of the evidence that is called before me. Therefore, it is important that I not be influenced by any documentary evidence that may or may not be put before me at the hearing of this Complaint.

Names of Witnesses

In its letter of March 5th, 1987 providing particulars, the Commission indicated that it would possibly call two witnesses to testify with respect to similar incidents. The Commission has disclosed the substance of the testimony of these witnesses, and the approximate dates in which the alleged events took place. The Commission has also agreed to provide the names of the companies on behalf of which Mr. Sodhi is said to have interviewed these witnesses. However, Commission counsel vigorously opposes providing the names of these witnesses.

Commission counsel cites the case of Walbar Machine Products of Canada v. OHRC, an unreported decision of M. R. Gorsky dated June 2, 1980. That case suggests at page 12 that it is well

settled that requests for information "put for the mere purpose of obtaining information as to the evidence by which the opposite party intends to prove the facts which he alleges", are not permitted. It goes on to say that "the situation is different where the names of potential witnesses are material facts upon which a party relies."

With respect, I frankly think these guidelines are neither helpful nor meaningful in these circumstances. Rather, it is more helpful to return to section 8 of the SPPA which provides that the Respondents are entitled to be furnished with "reasonable information" of the allegations against them.

It is the argument of the Commission that section 8 does not require disclosure of the source of the allegations, but rather merely of the substance of the allegations. The Commission has taken the same position with respect to the provision of further documents as it does with respect to the provision of the names of the two possible witnesses who may testify as to similar incidents involving the respondent Sodhi. The Commission has indeed provided information as to the substance of the allegations, and Mr. Sodhi apparently has no quarrel in this regard.

However, Mr. Sodhi does insist that he will be unable to locate relevant files or call relevant witnesses if he does not know who he is dealing with (page 3, written submissions), in spite of Commission counsel's claim that "the respondent knows the dates of the witnesses' contact with him and that should

allow him to make any necessary inquiries" (page 4, written submissions). Commission counsel has argued that any possible prejudice to the Respondents can be eliminated through an adjournment which would be available to the Respondents should they indeed be taken by surprise by any of the evidence or for that matter the identity of the two witnesses who may testify as to similar fact evidence.

I recognize that such an adjournment could possibly result in further delay but I consider the names of witnesses to be comparable to the provision of the further documents requested by the Respondents. I specifically would find that the names of witnesses are within the form of privilege in Canada referred to by the Canadian courts as the "work product" or the "lawyer's file". This form of privilege was developed in Hickman, Administrator v. Taylor et al. (1947), 329 U.S.495. Public policy seems to be the predominant theme advance by the United States Supreme Court for refusing to compel disclosure of a witness's statement obtained by one side of the litigation. The court states the following at page 511:

> Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways --aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to

> opposing counsel on mere demand much of what is now put down in writing would remain unwritten.

The Hickman decision has been followed in most jurisdictions in Canada. For example, in Steeves et al. v. Rapanos (1982), 140 D.L.R. (3d) 556, the British Columbia Supreme Court recognized this additional form of privilege. While the Court was of the view that this privilege did not foreclose the right to obtain a witness statement if the circumstances were justified, it took the position that the burden rests upon the applicant to satisfy a court that the privacy of the lawyer's brief should be invaded. I agree with this finding.

In my opinion the burden rested on the Respondents to demonstrate that the names of the two persons who may or may not be called as witnesses at the Inquiry herein should be revealed. In my opinion they have not demonstrated that the names of the witnesses are required for them to adequately prepare for the hearing. They have been provided with a considerable amount of detailed information as to the testimony of these two potential witnesses and have received an undertaking from Commission counsel that she will provide any further particulars that are required to clarify or correct the information that has already been provided. I find that the Commission has complied with the requirements of section 8 of the SPPA and provided reasonable information. They are therefore not required to provide the names of the witnesses to the Respondents.

ORDER

I therefore order that:

1. The Respondents' application for a summons to compel Judy Fiddes to appear before this Inquiry on March 18, 1987, or at any time thereafter, prior to the hearing of evidence on June 8th, 1987, is hereby dismissed.

2. The Respondents' applications for further particulars and for the names of any Commission witnesses who will be providing similar fact evidence are both dismissed. The Commission will provide within seven days the names of the companies on behalf of whom Mr. Sodhi interviewed these witnesses, as undertaken by Commission counsel.

3. The inquiry into the complaint herein will proceed on June 8, 1987, at Toronto.

Dated at Toronto this 28th day of April, 1987.

Frederick H. Zemans,
Board of Inquiry.

DATIN[illegible] SC[illegible]H and G[illegible]ARIO HUMAN RIGHTS C[illegible]MISS[illegible]

(Short title of proceeding)

Court file no. 487/87

DIVISIONAL COURT

BEFORE Eberle J.

DATE June 4/87

DISPOSITION - THIS ~~APPEAL~~

APPLICATION IS allowed.

The relief sought in the appeal was related to matters which were extensively dealt with by the Chairman in his reasons. They are interlocutory matters, and at least as to one of those matters, the subpoena, relief was deferred not denied, and he indicated further that adjournments of the hearing could be given if desirable to meet the ends of justice.

The authorities are clear that a court should interfere but rarely in the proceedings of a tribunal, and in the circumstances of this case, that principle is especially applicable.

I am not today asked to quash the appeal, but to grant a stay. For the reasons given, the appropriate relief is to lift any stay in the tribunal's proceedings which may be imposed by S. 25 of S.P.P.A., and I do so. This will allow hearing to proceed.

In addition, the appeal should also be stayed until completion of the hearing by the tribunal.

No costs.

Eberle

SUPREME COURT OF
(Supreme or District)

Proceeding commenced at Toronto

(DIVISIONAL COURT)

MOTION RECORD

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MINISTRY OF THE ATTORN[illegible]
GENERAL,
17th Floor, 18 King Street E[illegible]
TORONTO, Ontario.
M5C 1C5

Leith Hunter, Counsel

(416) 965-2556

Counsel for the Ontario Hu[illegible]
Rights Commission.

Ontario

Ministry of the Attorney General
Ministère du Procureur général

Crown Law Office
Civil Law
Bureau des avocats de la Couronne
Droit civil

416/965-

17th Floor/17e étage
18 King St. East/18, rue King, est
Toronto, Ontario M5C 1C5

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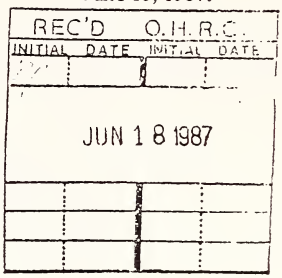
June 15, 1987.



Mr. Yan Lazor,
Counsel,
Ontario Human Rights Commission,
400 University Avenue,
TORONTO, Ontario.
M7A 1T7

Dear Mr. Lazor:

Re: Salamon and Sodhi.

I enclose a copy of the endorsement made on the record by Mr. Justice Eberle on the 4th of June, 1987. I will translate his endorsement for you for easy reference:

> The application is allowed. The relief sought in the appeal relates to matters which were extensively dealt with by the Chairman in his reasons. They are interlocutory matters, and at least as to one of those matters, the subpoena, relief was deferred, not denied, and he indicated further that adjournments of the hearing could be given if desirable to meet the ends of justice.
>
> The authorities are clear that a court should interfere but rarely in the proceedings of a tribunal, and in the circumstances of this case, that principle is especially applicable.
>
> I am not today asked to quash the appeal, but to grant a stay. For the reasons given, the appropriate relief is to lift any stay of the tribunal's proceedings which may be imposed by Section 25 of the S.P.P.A., and I do so. This will allow the hearing

to proceed. In addition, the appeal should also be stayed until completion of the hearing by the tribunal.

No costs.

Eberle, J.

Yours truly,

Leith Hunter,
Counsel.

LH/nlm

Encl.